

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MICHAEL  
RADCLIFFE,

Defendant and Appellant.

2d Crim. No. B297527  
(Super. Ct. No. VA147938)  
(Los Angeles County)

Anthony Michael Radcliffe appeals a judgment following his conviction for possession for sale of a controlled substance (Health & Saf. Code, § 11378), a felony, and simple possession of a controlled substance (*id.*, § 11377, subd. (a)), a misdemeanor. The trial court suspended execution of a two-year sentence and placed Radcliffe on probation. The court imposed a \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)), a \$50 laboratory analysis fee (Health & Saf. Code, § 11372.5), a \$40 court security fee (Pen. Code, § 1465.8, subd. (a)(1)), and a \$30 criminal conviction assessment (Gov. Code, § 70373).

We conclude, among other things, that Radcliffe has not shown that his counsel was ineffective by not raising an ability-to-pay objection to the fines and fees the trial court imposed based on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

### FACTS

On December 21, 2017, Los Angeles County Sheriff Detective Goro Yoshida obtained a search warrant and went with other officers to search Radcliffe's residence. Radcliffe told Yoshida that he sleeps in a "makeshift garage" that was converted into "a living quarters" at that residence. Radcliffe provided Yoshida with a key to a padlock on a door to that area. Radcliffe said he was the only one who had access to that area.

The officers entered this area to search for "methamphetamine or related evidence." They found documents containing Radcliffe's name, two digital scales, a "clear sandwich plastic bag containing methamphetamine," and other "unused smaller type of plastic baggies."

Yoshida testified that the methamphetamine the police recovered was possessed for the "purpose of sale." He based that opinion on the amount of methamphetamine found, the two scales, and the empty unused baggies. Police found between 14 to 15 grams of methamphetamine.

Radcliffe testified that he had prior convictions for possession of methamphetamine in 1993, 2009, and 2013. He stopped using methamphetamine in 2016 because of his blood pressure. He was not aware that methamphetamine was in his "apartment." The scales were there because he used them for buying and selling jewelry. He did not sell methamphetamine, and he "never sold it."

The jury convicted Radcliffe of possession and possession for sale of a controlled substance.

On January 8, 2019, the Court of Appeal filed *People v. Dueñas*, *supra*, 30 Cal.App.5th 1157, which involved a defendant's due process rights to receive an ability-to-pay hearing before a court may impose certain fines or fees.

Radcliffe's sentencing hearing took place on February 21, 2019. During sentencing, the trial court imposed a \$300 restitution fine, a \$50 laboratory analysis fee, a \$40 court security fee, and a \$30 criminal conviction assessment. At the sentencing hearing, Radcliffe's counsel did not mention *Dueñas* and did not raise any objection to the fines or fees the court imposed. He did not request a hearing on Radcliffe's ability to pay those fines and fees. The court did not mention *Dueñas* and did not offer or hold a hearing on Radcliffe's ability to pay the fines and fees.

## DISCUSSION

### *Ineffective Assistance of Counsel*

Radcliffe contends the record shows that his trial counsel was ineffective by not objecting to the fines and fees imposed at sentencing. We disagree.

"To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Kipp* (1998) 18 Cal.4th 349, 366; *Strickland v. Washington* (1984) 466 U.S. 668, 686 [80

L.Ed.2d 674, 692-693].) “ ‘Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his [or her] act or omission.’ ” (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) A defendant has the “burden of proving prejudice as a ‘demonstrable reality,’ not simply speculation as to the effect of the errors or omissions of counsel.” (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

“ ‘ “[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ ” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

In *Dueñas*, the Court of Appeal held that “the execution of any restitution fine imposed under [Penal Code section 1202.4] must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine.” (*People v. Dueñas*, *supra*, 30 Cal.App.5th at p. 1164; but see *People v. Hicks* (2019) 40 Cal.App.5th 320 [disagreeing with *Dueñas*], review granted Nov. 26, 2019, No. S258946.) An ultimate resolution of the dispute between *Dueñas* and *Hicks*, however, is not necessary for the purpose of deciding this case.

Radcliffe contends his trial counsel was ineffective for not citing *Dueñas*, not objecting, and not presenting evidence showing that he lacked the ability to pay the fines and fees. But this claim is being raised in an evidentiary vacuum. The record does not indicate that Radcliffe ever sought a statement from his trial counsel regarding his reasons for not raising a *Dueñas*

objection. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) It does not show “whether the fines, fees or assessments were of any consequence” or an issue of importance to Radcliffe at the time of sentencing. (*People v. Keene* (2019) 43 Cal.App.5th 861, 864-865.) “An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.” (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) The record Radcliffe relies on is not sufficient to support his claims about his trial counsel’s alleged ineffective performance. (*Mendoza Tello*, at p. 266; *Keene*, at pp. 864-865.)

Moreover, there are additional reasons why Radcliffe’s claim does not prevail. The People claim, contrary to Radcliffe’s assertions, evidence in the record shows that his counsel was, in fact, very effective during sentencing. They note that Radcliffe’s “financial stability was a key component of counsel’s argument for a probationary sentence.” Consequently, there was a strategic reason not to claim Radcliffe lacked the ability to pay fines and fees because that “would undercut the argument that [Radcliffe] led a stable enough life to be a good candidate for probation.” We agree.

Here the record of the sentencing hearing reflects that Radcliffe’s counsel’s main goal was to encourage the trial court to grant probation. There are a variety of factors the court may consider in determining whether a defendant is a good candidate for probation, including his or her employment history. (Cal. Rules of Court, rule 4.414(b)(4).) Here Radcliffe’s counsel argued that Radcliffe “will be able to be *self-sustaining* if the court gives him a grant of probation.” (*Italics added.*) He told the court that Radcliffe “does work.” The probation department report confirmed that Radcliffe was employed as a forklift driver at the

time of sentencing. Counsel noted that Radcliffe had a “somewhat stable life,” he “was able to maintain an apartment,” and he “would be a good candidate for probation.” Consequently, Radcliffe’s favorable financial condition was an important factor for this claim.

As the People note, Radcliffe’s counsel could reasonably believe that asking the trial court to waive fees because of inability to pay would undermine the claim that [Radcliffe] was a “self-sustaining” candidate for probation. “A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” (*People v. Gray* (2005) 37 Cal.4th 168, 207.) Counsel may make the tactical choice to highlight a major issue for the benefit of the defendant and not raise other issues that could hamper that strategy. (*People v. Welch* (1999) 20 Cal.4th 701, 729.) Here counsel achieved a tremendous benefit for Radcliffe by convincing the court to grant probation. Counsel could reasonably conclude the risk of pursuing a *Dueñas* inability-to-pay claim would be counterproductive. Radcliffe has not shown that his counsel’s alleged omission was not part of a sound strategy to obtain probation.

Moreover, because Radcliffe’s counsel determined Radcliffe was economically “self-sustaining,” he could reasonably conclude seeking fee and fine waivers would be futile. “Counsel is not ineffective for failing to raise futile objections.” (*People v. Ramirez* (2003) 109 Cal.App.4th 992, 1002.)

The People also claim Radcliffe has not shown prejudice, the second required prong of an ineffective assistance claim. They note the record does not support the claim that he lacked

the ability to pay fees and fines. “Ability to pay does not necessarily require existing employment or cash on hand.” (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) But here the probation report shows he was employed at the time of sentencing. At trial Radcliffe testified that he and his ex-brother-in-law also made money by buying and selling jewelry. Radcliffe has not made a sufficient showing as to why the trial court would waive fees given his employment status at the time of sentencing. This is particularly the case here because: 1) the total amount of fees was not “unduly burdensome”; 2) the trial court’s order and the “law does not require immediate payment” (*id.* at p. 786); and 3) there is no showing that at the time of sentencing that Radcliffe lacked the ability “to make payments on these amounts.” (*People v. Aviles* (2019) 39 Cal.App.5th 1055, 1077.)

#### DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Olivia Rosales, Judge

Superior Court County of Los Angeles

---

Rachel Varnell, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief  
Assistant Attorney General, Susan Sullivan Pithey, Assistant  
Attorney General, Stephanie C. Brennan and Nathan Guttman,  
Deputy Attorneys General, for Plaintiff and Respondent.